General Dynamics Corporation, Quincy Shipbuilding Division *and* Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and its Local 5. Cases 1-CA-20459 and 1-CA-20768 (1-2)

22 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 30 August 1983 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

As spelled out fully in the judge's decision, the Union requested the Respondent to furnish it with six items of information which it claimed were relevant and necessary to the performance of its role as the bargaining unit employees' collective-bargaining representative. The six items were: (1) the Respondent's lists showing the excuses offered by employees to the Respondent's supervisors for refusing to work overtime on the weekend of 2 October 1982; (2) the Respondent's requisition forms showing the amounts of overtime requested by the Respondent's department heads for the weekends from 18 September 1982 through 16 October 1982; (3) the Respondent's records showing the amounts of overtime actually worked by employees on the weekends from 28 August 1982 through 21 November 1982; (4) the Respondent's disciplinary runs (computer printouts) showing, by individual employee, the disciplinary measures imposed on employees since April 1982; (5) the Respondent's precedent runs showing, by type of offense, the disciplinary measures imposed on employees for refusal to work overtime and poor work quality since October 1977; and (6) the amount of the fee paid by the Respondent to Prudential Insurance Company for the actuarial, consulting, and other administrative services rendered by Prudential with respect to the Respondent's medical insurance program.

After carefully reviewing the record evidence and the Respondent's contentions, we find, in agreement with the judge, that the issue of whether the confidential records clause in the grievance-arbitration provision of the parties' collective-bargaining contract constitutes a waiver of the Union's right to the second, fifth, and sixth requested items of information should not itself be deferred to the grievance-arbitration procedure.[3] In so finding, we rely particularly on the fact that the Union requested the items in question for the purpose of pursuing grievances which it had already filed over the disciplinary measures imposed on employees for refusing to work overtime on the weekend of 2 October 1982, and for the purpose of determining whether to file additional grievances over those measures and over the increase in the medical insurance rates charged laid-off employees, which the Respondent announced in December 1982. As we observed in our recent decision in *General Dynamics Corp.*, 268 NLRB 1432 (1984), where we declined to defer the issue of whether the identical confidential records clause constituted a waiver of the Union's right to similarly grievance-related information (268 NLRB at fn. 2):

> [T]he procedural issue of disclosure of the [information] is merely preliminary to the resolution of the parties' substantive dispute over the [issues raised by the grievances]. In these circumstances, we find no merit in encumbering the process of resolving the pending . . . grievances with the inevitable delays attendant to the filing, processing, and submission to arbitration of a new grievance regarding the information request. Such a two-tiered arbitration process would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration. Nor would it be consistent with prior Board decisions in this area. See, e.g., *Safeway*

[1] In the fifth paragraph of the decision, the judge stated, "The Union also claimed that Respondent's past practice was to impose no discipline on employees for overtime refusals [footnote omitted] Respondent was otherwise able to meet its manpower needs . . . ." It is clear from the context that the judge meant to state, "The Union also claimed that Respondent's past practice was to impose no discipline on employees for overtime refusals [footnote omitted] if Respondent was otherwise able to meet its manpower needs. . . ." This inadvertent error does not affect our decision herein.

[2] In the first paragraph of the section of the decision entitled "The Remedy," in par. 2(b) of the recommended Order, and in the third paragraph of the notice, the judge stated that the Respondent was required to furnish the Union with the weekly total number of employees, by department represented by the Union, who worked Saturdays and Sundays commencing on 25 October 1982 through 21 November 1982. The record shows that the Union requested the foregoing information for Saturdays and Sundays commencing on 28 August 1982 through 21 November 1982. These inadvertent errors do not affect our decision herein, and we shall modify the recommended Order and the notice accordingly.

[3] The Respondent does not contend that the confidential records clause constitutes a waiver of the Union's right to the first, third, and fourth requested items of information.

Stores, 236 NLRB 1126 fn. 1 (1978); *St. Joseph's Hospital*, 233 NLRB 1116 fn. 1 (1977).

We also find, in agreement with the judge, that the confidential records clause in the grievance-arbitration provision in fact does not constitute a waiver of the Union's right to the second, fifth, and sixth requested items of information. In so finding, we note in particular, as we did in construing the identical clause in *General Dynamics Corp.*, above, that the explicit terms of the confidential records clause indicate that the clause is limited in its application to the contractually created obligation to furnish information in connection with factual disputes arising at the second step of the grievance-arbitration procedure. Similarly, we note, as we did in evaluating comparable evidence in *General Dynamics Corp.*, above, that the evidence does not establish that the parties' actual practice has consistently been to apply the confidential records clause in contexts other than the second step of the grievance-arbitration procedure; on the contrary, the record shows that the testimony of Labor Relations Manager Raffeld to that effect was in essence entirely conclusory, that Raffeld failed to identify the context in which any of the purported instances he mentioned of application of the confidential records clause in fact occurred, and indeed that Raffeld explicitly admitted that he did not remember the context in which any of the purported instances occurred. In addition, we note that the undisputed evidence establishes that with regard to the fifth requested item the Respondent had furnished the Union with generally comparable information in the course of past grievance proceedings, that with regard to the sixth requested item the Respondent furnished the Union with directly related information as soon as the request in question was made, and that with regard to the second requested item the Respondent stated that it would furnish the Union with closely related information if the grievances in question reached the stage of arbitration. Finally, we note that the record does not show that the Respondent has ever provided, either in its refusals to furnish the items or in its evidence before the judge or in its brief to the Board, any explanation of why the items in question should be found to constitute confidential records under the confidential records clause other than what are in essence simply repeated conclusory assertions that they should be.

We likewise find, in agreement with the judge, that all six of the requested items of information are relevant and reasonably necessary to the Union in the performance of its role as the employees' collective-bargaining representative. It is clear that the first five requested items would be relevant to the Union's pursuit of the grievances which it filed over the disciplinary measures imposed on employees for refusing to work overtime on the weekend of 2 October 1982, and to the Union's determination of whether it should file additional grievances over those measures. This information would be relevant because the items in question would be helpful in determining such matters as whether the treatment of individual employees who refused to work overtime on the weekend in question was consistent with the treatment of other employees who did the same, whether the treatment of employees who refused to work overtime on the weekend in question was commensurate with the actual need for overtime on that weekend, whether the treatment of employees who refused to work overtime on the weekend in question was consistent with the treatment of employees who had refused to work overtime on other occasions, and whether the treatment of employees who refused to work overtime on the weekend in question was consistent with the treatment of employees who had committed other types of offenses. It is similarly clear that the sixth requested item would be relevant to the Union's determination of whether it should protest the increase in the administrative fee which the Respondent paid to Prudential and which in turn was at least in part passed on to laid-off employees, either by filing a grievance over the increase or by demanding bargaining about the fee, because the item in question would be helpful in determining such matters as whether the fee charged by Prudential was commensurate with the services rendered by Prudential and whether the fee charged by Prudential was comparable to the fees charged by other insurance companies. In this regard, we note that, contrary to the Respondent's suggestion that the fee charged by Prudential is beyond the control of the Respondent's responsible corporate officials, record evidence—namely, the unequivocal testimony of Compensation and Benefits Manager Sussman—establishes that the Respondent's headquarters officials negotiate the fee with Prudential and sometimes succeed in negotiating a change in the fee. We also note that, contrary to the Respondent's assertion that the other cost elements of the overall insurance rate charged by Prudential which it gave to the Union would be sufficient to enable the Union to figure out the administrative fee charged by Prudential, record evidence—again, the unequivocal testimony of Manager Sussman—establishes that the cost elements which the Respondent gave to the Union would not be sufficient to enable the Union to do so.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, General Dynamics Corporation, Quincy Shipbuilding Division, Quincy, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Furnish to the Union the following: (1) the reasons supplied by employees to the Respondent for their inability to work about 2 and 3 October 1982; (2) the weekly total number of employees, by department represented by the Union, who worked Saturdays and Sundays commencing 28 August 1982 through 21 November 1982, and all overtime request forms for the weekend of 2 and 3 October 1982, the two weekends before that weekend and the two weekends subsequent; (3) the disciplinary runs for departments 826 (shipfitters), 829 (welding), 827 (chipping), 827 (burning), and 828 (rigging); (4) the precedent runs for the offenses of poor work quality and refusal to work overtime; and (5) the amount of the fee paid by the Respondent to Prudential Insurance Company for the services rendered to the Respondent's medical insurance program."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, and its Local 5 by refusing to furnish it with information that it requests which is relevant and reasonably necessary to the processing of and evaluation of grievances and preparing them for arbitration and to the Union's performance of its duties on behalf of our employees, both in the negotiation and in the administration of its collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL furnish to the Union the following: (1) the reasons supplied by employees to us for their inability to work on or about 2 and 3 October 1982; (2) the weekly total number of employees, by department represented by the Union, who worked Saturdays and Sundays commencing on 28 August 1982 through 21 November 1982, and all overtime request forms for the weekend of 2 and 3 October 1982, the two weekends before that weekend and the two weekends subsequent; (3) the disciplinary runs for departments 826 (shipfitters), 829 (welding), 827 (chipping), 827 (burning), and 828 (rigging); (4) the precedent runs for the offenses of poor work quality and refusal to work overtime; and (5) the amount of the fee paid by us to Prudential Insurance Company for the services rendered to our medical insurance program.

GENERAL DYNAMICS CORPORATION, QUINCY SHIPBUILDING DIVISION

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court held that the duty to bargain in good faith includes the obligation of an employer to disclose to its employees' collective-bargaining representative such material as is relevant and reasonably necessary to permit the representative to administer the terms and provisions of the agreement and to intelligently perform its duties. See also *Trustees of Boston University*, 210 NLRB 330, 333 (1974); *Montgomery Ward & Co.*, 234 NLRB 588, 589 (1978). In *Acme*, the material was requested to permit the representative to determine whether to pursue a grievance to arbitration. It has also been held numerous times that the duty to supply information extends to a request for material to prepare a grievance for arbitration. *Fafnir Bearing Co.*, 146 NLRB 1582, 1586 (1964), enfd. 362 F.2d 716, 721 (2d Cir. 1966); *St. Joseph's Hospital*, 233 NLRB 1116, 1119 (1977); *Designcraft Jewel Industries*, 254 NLRB 791 (1981); *Kroger Co.*, 226 NLRB 512 (1976); *Fawcett Printing Corp.*, 201 NLRB 964, 972–973 (1973); *Metropolitan Life Insurance Co.*, 150 NLRB 1478, 1485–86 (1965); *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 716 (D.C. Cir. 1981); *Chesapeake & Potomac Telephone Co.*, 259 NLRB 225 (1981), enfd. 687 F.2d 633 (2d Cir. 1982). This proceeding involves the issue of whether Respondent General Dynamics Corporation, Quincy Shipbuilding Division violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to provide certain information pursuant to requests made by Charging Party Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, and its Local 5 (the Union).[1]

[1] The relevant docket entries are as follows: The unfair labor practice charge in Case 1–CA–20459 was filed on November 22, 1982, and complaint issued thereon on January 7, 1983. On February 25, 1983, new unfair labor practice charges were filed by the Union in Case 1–CA–

Continued

Respondent maintains a shipyard in Quincy, Massachusetts, at which it fabricates, sells, and distributes ship components, other marine components, and related product.[2] Overtime is a regular part of the work at the shipyard because of time commitments involved in the construction of a ship; and the collective-bargaining agreement between Respondent and the Union requires employees to accept overtime assignments unless they have a reasonable excuse for declining them.[3]

In September 1982,[4] 458 employees were requested to work overtime during the September 25–26 weekend, but 108 employees refused, a disproportionate number in the belief of Respondent's officials. As a consequence, with the knowledge that additional overtime would have to be worked the weekend of October 2–3, supervisors were instructed to make known to employees that overtime was to be worked and that, if it was refused without reasonable excuse, employees would be disciplined. A leaflet was distributed to all employees to the same effect, and certain of the Union's leadership was consulted to enlist their help in ensuring that work would be performed. The Union was told that, although employees had violated the contract the prior weekend, Respondent was issuing only warning notices, despite its progressive disciplinary policy which, in certain instances, would have required greater discipline.[5] The Union was cautioned that Respondent would not continue to be so lenient.

Respondent asked 858 unit employees to work the October 2–3 weekend. However, of those employees, 495 refused to do so. True to its word, Respondent disciplined 256 employees: 202 employees received warning slips, 50 were suspended, and 4 were discharged. On October 12, the Union filed a grievance protesting the discipline of these employees. In addition, later that month, grievances were filed on behalf of employees Lincardio (burning department), Benda (chipping department), Morrill (rigging department), and Waldstein (welding department) concerning their discharges because of their refusal to work overtime that weekend. Additional grievances were filed on behalf of employees Brown (welding department) and Richardson (shipfitting department) in February 1983 protesting their discharges.[6]

Either prior to grievances being filed or after they had been filed, the Union and its president Jonathan Brandow ascertained that Respondent's supervisors had compiled a master list of employees who were asked to work overtime, which list recorded the employees' responses and, if overtime was refused, recited the reasons offered by the employees. The Union also learned that the employees generally were unaware of what the supervisors wrote down on the list, but some complained that their supervisors had not accurately or fully recorded their excuses. The Union also received complaints that Respondent had disciplined some employees who had offered the same excuses as employees who had not been disciplined. The Union also claimed that Respondent's past practice was to impose no discipline on employees for overtime refusals[7] if Respondent was otherwise able to meet its manpower needs and suspected that Respondent may have inflated its overtime requirements for weekend of October 2–3 in order to disrupt a union meeting scheduled for October 2 to discuss Respondent's initiation of a 20-hour workweek for two employees. Brandow surmised this because, shortly after the announcement of the union meeting, Respondent circulated its leaflet reminding employees of their obligation to work overtime. Finally, the Union became concerned that, while Respondent professed to follow its progressive disciplinary policy with respect to the discharge of the employees named above, other employees with similar disciplinary records had not been treated as harshly.

To ensure that the discipline meted out by Respondent was not disparate on October 18, the Union requested from Respondent its master list of all employees who had been asked to work overtime for the October 2–3 weekend, the reasons they gave for refusing, and what discipline, if any, Respondent gave to the employees. Respondent has refused to produce the employees' reasons, as recorded by the supervisors. Instead, it gave the Union a typed list of the employees it requested to work overtime, what discipline was imposed, and whether the employees had given a reasonable excuse, designated by an "x" under the appropriate column "YES" or "NO." Dale Raffeld, Respondent's manager of labor relations, also agreed to supply the Union an employee's reason only at the arbitration hearing of each employee's grievance.

Certainly, a claim of disparity in discipline is a subject cognizable in arbitration, and disparate treatment has often been used as an argument for limiting or rescinding punishment of an employee. *Chesapeake & Potomac Telephone Co.*, supra. The reasons given by all employees might prove that certain employees were disciplined, while others were not, despite the fact that they all provided the same or similar excuses. Raffeld's offer to give the reasons only at the arbitration of each employee was

20768 (1–2). An order consolidating the cases and an amended complaint issued on April 12, 1983. Hearing was held in Boston, Massachusetts, on May 23, 1983.

[2] Respondent admits, and I find, that annually it sells and ships, and purchases and receives, products, goods, and materials valued in excess of $50,000 directly to and from points outside the Commonwealth of Massachusetts. I conclude that Respondent is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. I further conclude, as Respondent admits, that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] The Union disputes that there is such a requirement, and this finding is not intended to be dispositive of the issue. However, it appears to be a fair reading of the contract and is necessary to state as background to the instant controversy.

[4] All dates herein refer to the year 1982, unless otherwise stated.

[5] Under the progressive disciplinary policy, an employee receives a written warning for first violation of rules and regulations and a suspension for a second violation within 6 months of the first, and an employee is subject to discharge for a third violation within 6 months of the second. A disciplinary slip issued for a violation of rules and regulations is eliminated from an employee's record if the employee commits no further violations for 6 months.

[6] The names of these departments, as set forth in the official transcript, are apparently inaccurate. I have used the designations referred to in the briefs filed by the General Counsel and Respondent.

[7] Indeed, on some prior occasions, employees were not asked for their reasons for refusing overtime work.

inadequate because (1) it would force the Union to proceed to arbitration to obtain the reason without the information necessary to make a judgment whether to process that particular claim to arbitration; (2) the Union would obtain only the reason recorded for each employee for whom it grieved and would not know the reasons recorded for those employees whose grievances had not yet been arbitrated; and (3) the Union would never obtain information about those employees who were not disciplined and who thus had no claims to process. Only by analyzing all the facts relating to each employee who was requested to work overtime could the Union obtain a complete picture of what occurred. The request was clearly within the scope of information relevant and necessary for the Union to determine whether to continue processing the grievances of all employees.[8]

The Union also requested in November that Respondent provide it with Respondent's overtime requisitions for the weekend of October 2–3. That request, too, was clearly relevant to the Union's claim that Respondent had deviated from its alleged past practice of not disciplining employees for overtime refusals if Respondent was otherwise able to meet its manpower needs. Furthermore, the requisitions for that weekend and the two weekends before and after would show whether Respondent had inflated its need for employees in order to create a method of disciplining employees who might be protesting its institution of a 20-hour workweek for other employees. Raffeld was ready and willing to supply, but only at the arbitration hearing, the number of employees which high-level management ultimately determined was needed for the October 2–3 weekend. It is thus clear that he knew what the Union was looking for, and, by his willingness to produce the number at the arbitration, he was aware that the original documents might prove at least part of the Union's case.[9]

Finally, the Union requested computer printouts of discipline given to employees to ascertain whether Respondent had consistently applied its progressive disciplinary policy with respect to the above-named employees. Once again, a claim of disparate treatment is typical in arbitration, as it is before the Board, and is clearly relevant to the Union's responsibilities in ensuring compliance with the terms and provisions of its collective-bargaining agreement and pursuing the grievances contemplated or filed. The disciplinary runs were requested for the five departments in which the above-named employees were employed and would be clearly relevant to the Union's claim of disparate treatment. The Union also requested Respondent's "precedent runs" as they related to refusals to work overtime and poor work quality, allegations of which were made against the above-named employees. Again, disparate treatment could be shown to test Respondent's claim that employees were regularly disciplined for refusing overtime and to ascertain the severity with which Respondent punished such offenses in the past. Indeed, Raffeld testified that one of his duties is to ensure that Respondent disciplined its employees consistently. The precedent runs, which recorded discipline given to employees from 1977, were important to him for that purpose and equally important for the Union to prove inconsistency.

Unrelated to the overtime refusal incident was the Union's demand in December 1982 to disclose the amount of the fee which Respondent pays to Prudential Insurance Company for actuarial, consulting, and other administrative services rendered with respect to Respondent's medical insurance programs. Under the collective-bargaining agreement, Respondent provides medical insurance at Respondent's group rate cost. In December 1982, Respondent notified the Union that the cost of family-plan medical insurance for laid-off employees was being raised from $175 to $216 per month. Respondent explained that the rate increase was a result of various factors, including trends in medical expenses and the fees which Respondent paid to Prudential for its services. The Union asked for the amount of the fee Respondent paid to Prudential, but Respondent refused. It did, however, comply with the Union's request to supply figures for hospital, accident, and sickness costs and projections concerning hospital expense inflation rates.

No question has been raised that the Union does not represent laid-off employees. The amount that such laid-off employees must pay to continue their medical health benefits is clearly a term and condition of employment and is presumed to be relevant to the Union's performance of its duty on behalf of its employees, both in the negotiation and in the administration of its collective-bargaining agreement. *Western Massachusetts Electric Co.*, 234 NLRB 118 (1978), enfd. 589 F.2d 42 (1st Cir. 1978); *Andy Johnson Co.*, 230 NLRB 308 (1977); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965). That Respondent was willing to discuss the components of the cost of insurance not only with the Union but also with four other labor organizations which represent its employees but withhold the details of only one item effectively demonstrates the futility of its claim that this one cost factor was unnecessary to the Union's function.

Having found that all of the information requested by the Union is relevant and necessary to meet its statutory obligation, I turn to Respondent's other defenses to its supply of the information requested. First, Respondent claims that it has provided the Union with sufficient information to meet its statutory obligation. I have considered Respondent's claims carefully and reject them. Without belaboring this decision, for the purposes of deciding whether Respondent disparately treated its employees, it is essential to know what excuses for refusing overtime were offered by all employees and whether Respondent, on the basis of its own lists, treated employees differently. That union officials may be able to obtain from employees their versions of what they told their su-

[8] The collective-bargaining agreement required that all grievances be filed within 20 working days of the event which gave rise to the grievances except, where a discharge was grieved, the grievance had to be filed within 10 working days. Thus, time for filing is of the essence, even if the Union does not have all information necessary to make a judgment whether its claim is valid and defensible.

[9] In so holding, I make no judgment whether, even if the Union proved what it has attempted to demonstrate, employees were justified in refusing to work overtime. That is solely a matter for determination by the arbitrator. The findings and conclusions herein related only to whether the materials requested are relevant and should be produced pursuant to Sec. 8(a)(5) of the Act.

pervisors may be the basis of a claim which might be made by the Union in arbitration. Thus, one of the issues of the pending arbitration would be not whether the excuses given were reasonable to Respondent, but whether the excuses given or recorded were reasonable. However, the Union also seeks to present the issue of whether, comparing the reasons recorded by Respondent, it acted reasonably in excusing some, but not others. For that second issue, Respondent's lists become vital; and Respondent has not provided that information.

Respondent further contends that the collective-bargaining agreement expressly provides that a weekly overtime list containing the names of all employees who performed overtime work on each day of the previous week shall be given to the Union. However, during hearing, no proof was elicited that these weekly overtime lists were ever given to the Union. Therefore, I cannot conclude that the Union already has some of the information that it has requested. I make the same findings with respect to the Union's knowledge of discipline given to employees; but I note that the agreement provides that Respondent shall advise the Union only when an employee has been suspended or discharged, and not when a warning has been issued. To Respondent's argument that the massive overtime refusals that occurred on the weekends of September 25–26 and October 2–3 were unprecedented and that Respondent specifically notified all employees that progressive discipline would be administered henceforth with respect to overtime refusals, that is an argument which is better made before the arbitrator and not before the Board. The Union is entitled to information which will be helpful to substantiate its claim of disparate treatment or to permit it to make an informed judgment not to proceed with that claim.

Respondent also contends that the Union's president, vice president, and stewards are paid by Respondent, despite the fact that they are engaged in union business full time. Thus, the argument continues, they were able to obtain some of the information requested of Respondent, and in fact they distributed flyers to ascertain what reasons employees had given to excuse their refusal of overtime work and whether they had been disciplined for their refusal. As stated above, the information gathered may have been helpful to support one of the Union's claims; but, even with that information, it still must be compared with Respondent's list of excuses to ascertain what Respondent relied on in deciding whether or not to impose discipline.

Respondent argues, however, that the overtime requests, precedent runs, and the fee paid to Prudential constitute confidential employer records as to which the Union has waived its rights. The sole reference to confidential employer records is contained in article IV, section 4, step 2 of the grievance procedure of the parties' collective-bargaining agreement, as follows:

> A grievance appealed to step 2 of the grievance procedure shall be submitted by the steward to the department head or his designated alternate of the department. If there is disagreement as to the facts relating to the grievance, the department head and the steward shall, at the request of either, jointly investigate the facts; provided, however, that this shall not require the department head to make available to the steward classified or confidential employer records. If the steward and department head are unable to reach a satisfactory adjustment within three (3) working days after the grievance is presented to the department head, the Union may appeal the grievance to step 3 of the grievance procedure.

The Union's right herein to the requested information is conferred by the Act, and does not obtain by contract. The Supreme Court in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 and fn. 12 (1983), recently held that a waiver must be "clear and unmistakable," citing with approval *Chesapeake & Potomac Telephone Co. v. NLRB*, supra, 687 F.2d 633, 636 (1982), in which the Second Circuit stated:

> [N]ational labor policy disfavors waivers of statutory rights by unions and thus a union's intention to waive a right must be clear before a claim of waiver can succeed. Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. The language of the collective-bargaining agreement will effectuate a waiver only if it is "clear and unmistakable" in waiving the statutory right. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 722 (2d Cir. 1966). Accord *NLRB v. Pepsi-Cola Distributing Co., Inc.*, 646 F.2d 1173, 1176 (6th Cir. 1981). *cert. denied*, . . . U.S. . . . 102 S. Ct. 1993, 72 L.Ed. 2d 456 (1982); *Proctor & Gamble Manufacturing Co. v. NLRB*, 603 F.2d 1310, 1317–18 (8th Cir. 1979); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 600 F.2d 918, 922–23 (D.C. Cir. 1979) (*Road Sprinkler I*); *General Electric Co. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969), *cert. denied*, 396 U.S. 1005, 90 S. Ct. 577, 24 L.Ed. 2d 496 (1970); *Timken Roller Bearing Co. v. NLRB, supra*, 325 F.2d at 751. The same standard applies to conduct of the parties; whether alone or in combination with contractual language, conduct can effectuate a waiver only if the union's intent to waive is clear and unmistakable from the evidence presented. *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982) (*Road Sprinkler II*); *Communication Workers Local 1051 v. NLRB*, 644 F.2d 923, 927 (1st Cir. 1981); *Proctor & Gamble Manufacturing Co. v. NLRB*, supra, 603 F.2d at 1317–18; *Florida Steel Corp. v. NLRB*, 601 F.2d 125, 129–30 (4th Cir. 1979); *Metromedia, Inc., KMDC-TV v. NLRB*, 586 F.2d 1182, 1189 (8th Cir. 1978); *NLRB v. R.L. Sweet Lumber Co.*, 515 F.2d 685, 795 (10th Cir.), *cert. denied*, 423 U.S. 986, 96 S. Ct. 393, 46 L. Ed. 2d 302 (1975); *C-B Buick, Inc. v. NLRB*, 506 F.2d 1086, 1096 n. 21 (3d Cir. 1975).

The cited contract language does not clearly and unmistakably waive the Union's statutory right to the infor-

mation sought. First, the clause applies only to step 2 of the grievance procedure, where there is a disagreement between a steward and a department head. It does not apply to any of the other steps in the grievance procedure and particularly where, as here, the requests were made by the Union's president to Respondent's manager of compensation and benefits and its manager of labor relations. In this connection, the parties' agreement provides that many grievances commence at step 3,[10] as did some of the instant grievances. While there may have been an agreement to permit Respondent to withhold certain records from low-level union representatives, there was no clear and unmistakable provision allowing Respondent to withhold such records from the Union's president. Furthermore, the requests for information about the fees paid to Prudential were made not during the course of the grievance procedure but were made during the course of discussions to ascertain the legitimacy of the cost to be paid by laid-off workers for medical insurance.

Nor do I find that the past conduct of the parties has established any waiver. Respondent's prior denial of its affirmative action plan was made during a step 2 conference. In another instance, Respondent's refusal to provide the Union with a study allegedly showing serious defects in workmanship of Respondent's piping system was the subject of an unfair labor practice charge filed by the Union and decided adversely to Respondent in JD-56-83. The Union has been granted disciplinary records of employees other than the grievant in a given case and the precedent run contains solely disciplinary records, albeit for a lengthier time period and for all employees, active or inactive. Indeed, Respondent agreed in its current agreement to notify the Union of all suspensions and discharges. Finally, I note that Respondent did not claim that the requisitions for overtime were confidential and agreed to supply certain information about them, as well as past disciplinary records, at the arbitration hearing. I, therefore, find no support for Respondent's contention that the parties' past practice demonstrates that the production of the documents sought herein has been waived.

Respondent also contends that a determination of whether certain documents requested by the Union constitute confidential employer records within the meaning of its contract is a question which depends on an interpretation of the collective-bargaining agreement and, thus, one which must be deferred to arbitration under *Collyer Insulated Wire*, 192 NLRB 837, 841-842 (1971), citing *United Aircraft Corp.*, 204 NLRB 879, 880 (1972), enfd. 525 F.2d 237 (2d Cir. 1975). *United Aircraft* is inapposite. The contract there provided for the production of certain documents at step 2 but not at step 1. The Board determined that: "Whether or not this silence constitutes a waiver and whether or not the step 2 requirement mandates the production of the particular records and/or information which the Union requested are matters best resolved at arbitration." Here, however, with the exception of Respondent's commitment to notify the Union of terminations and suspensions, there is no contractual provision requiring the production of any documents and, with only the clause permitting Respondent to withhold confidential records, there is little basis for an arbitrator to grant any relief to the Union, other than to define the limitation on the production of confidential records. It is not gainsaid that, with the exception of notifications of discharges and suspensions, he has the power to make any award directing their production.

In addition, since *United Aircraft*, the Board has not deferred to arbitration the issue of the statutory right to the production of information under Section 8(a)(5) of the Act. In *Worcester Polytechnic Institute*, 213 NLRB 306 (1974), the Board adopted the decision of Administrative Law Judge Joel A. Harmatz, who stated, at page 309, that to find merit in deferral to arbitration:

> . . . would require labor organizations to proceed to arbitration without the information necessary to full assessment of its claim, and, at that level, for the first time have access to data which might well indicate that the grievance ought never to have been brought in the first place. This consequence has been regarded by the Supreme Court as one which would encumber rather than facilitate the arbitral process.[6] Subsequent to the Board's announcement of the *Collyer* policy a majority of the Board implicitly agreed with the aforesaid observation of the Supreme Court in concluding that an 8(a)(5) allegation based on a denial of information relevant to the evaluation and processing of a grievance would not be deferred to arbitration. Thus, in *United-Carr Tennessee, a Division of TRW, Inc.*, [202 NLRB 729 (1972)] a Board panel adopted without comment Administrative Law Judge Lipton's holding that "where the employer withholds requested information which is potentially relevant in assisting a union intelligently to evaluate or process a grievance—unless the statutory right to such information is effectively waived in the contract—the Board's *Collyer* doctrine is not applicable to such an issue."[7] I view that decision as controlling herein. I have heretofore found that the applicable collective-bargaining agreement fails to embody a clear and unequivocal waiver of either the Union's right to the information sought or its right to grieve unjust management layoff decisions. Furthermore, the fact that arbitration is now pending, which includes a request on the arbitrator that the College produce the information, hardly serves as a basis for distinguishing *United-Carr*, supra. To hold otherwise would result in nullifcation of statutory precedent entitling a labor organization to information potentially necessary to evaluate whether or not a grievance should be pursued. Harmonious bargaining relationships and industrial peace require strict adherence to statutory principles which are calculated to minimize disputes. In this case the Union's having elected to proceed to arbitration, on an uniformed basis, fails to furnish any cogent excused for the College's re-

[10] Art. IV, sec. 7, provides, in part: "In the case of any question involving the interpretation or application of this Agreement, or affecting employees of more than one department, the first two (2) steps of the grievance procedure shall be omitted and the case shall be referred directly to the Labor Relations Department."

fusal to provide information during the prearbitration stages and at a time when the Union, if such data were available, might well have been persuaded that the facts supported the propriety of the layoff. Furthermore, by virtue of the College's contention, whatever the outcome of the arbitration proceeding, the failure to take steps required by the statute which might have averted a grievance would stand unremedied, and to withhold Board processes would, perforce, entail a condonation of the College's disregard of its statutory obligations, a result which would hardly contribute to effective implementation of the arbitral process in the future.

[6] *N.L.R.B. v. Acme Industrial Co., supra*, 437–439.

[7] There, as here, the information sought related to a grievance covering a subject area which, according to management's view of its contract rights, was immune from challenge . . . .

See also *Safeway Stores*, 236 NLRB 1126 fn. 1 and 1128 (1978); *International Harvester Co.*, 241 NLRB 600, 602 (1979).[11]

By virtue of the foregoing, I conclude that Respondent, by not furnishing the requested material, violated Section 8(a)(5) and (1) of the Act. Respondent's activities set forth herein, occurring in connection with its operations described herein, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom. I shall also recommend that Respondent, on request, furnish the Union with the following requested information: (1) the reasons supplied by employees to Respondent for their inability to work on or about October 2 and 3, 1982;[12] (2) the weekly total number of employees, by department represented by the Union, who worked Saturdays and Sundays commencing on October 25, 1982, through November 21, 1982, and all overtime request forms for the weekend subsequent; (3) the disciplinary runs for departments 826 (shipfitters), 829 (welding), 827 (chipping), 827 (burning), and 828 (rigging); (4) the precedent runs for the offenses of poor work quality and refusal to work overtime; and (5) the amount of the fee paid by Respondent to Prudential Insurance Company for services rendered to Respondent's medical insurance program.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, General Dynamics Corporation, Quincy Shipbuiding Division, Quincy, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collective bargaining with Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, and its Local 5 by refusing to furnish it with information that it requests which is relevant and reasonably necessary to the processing of and evaluation of grievances and preparing them for arbitration and to the Union's performance of its duties on behalf of Respondent's employees, both in the negotiation and in the administration of its collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Furnish to the Union the following: (1) the reasons supplied by employees to Respondent for their inability to work about October 2 and 3, 1982; (2) the weekly total number of employees, by department represented by the Union, who worked Saturdays and Sundays commencing on October 25, 1982, through November 21, 1982, and all overtime request forms for the weekend of October 2 and 3, 1982, the two weekends before that weekend and the two weekends subsequent; (3) the disciplinary runs for department 826 (shipfitters), 829 (welding), 827 (chipping), 827 (burning), and 828 (rigging); (4) the precedent runs for the offenses of poor work quality and refusal to work overtime; and (5) the amount of the fee paid by Respondent to Prudential Insurance Company for the services rendered to Respondent's medical insurance program.

(b) Post at its Quincy, Massachusetts facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Rea-

[11] Even if *United Aircraft* applied to the production of notices of discharges and suspensions, it would serve no useful function to defer to arbitration this one small portion of the complaint herein, while enforcing Sec. 8(a)(5) with respect to the remainder of the complaint.

[12] Brandow testified that Raffeld had a master list setting forth all excuses. Raffeld denied the existence of such a list. To the extent that Raffeld is correct, Respondent shall be required to produce all documents written by its supervisors who recorded the reasons for employees' refusing to work overtime.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.